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No. 91-_____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PAUL DELO,

Petitioner,

vs.

LARRY GRIFFIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER ABUSE OF THE WRIT UNDER 28 U.S.C. § 2254, RULE 9(b) IS EXCUSED WHEN A HABEAS PETITIONER ALLEGES, IN A PETITION FOR REHEARING TO THE COURT OF APPEALS, THAT PREVIOUS HABEAS COUNSEL "MAY NOT" HAVE PRESENTED CLAIMS OF CONSTITUTIONAL DIMENSION THAT "MAY HAVE" MERIT TO THE DISTRICT COURT, WITHOUT ALLEGING CAUSE AS REQUIRED BY McCLESKEY V. ZANT, 499 U.S. ___ (1991).

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The April 14, 1992 panel opinion of the United States Court of Appeals remanding the petition for writ of habe-

as corpus is published in the Appendix at A-1. The February 3, 1992 panel opinion of the United States Court of Appeals remanding the petition for writ of habeas corpus is reported at 956 F.2d 167 (8th Cir. 1992), and published in the Appendix at A-7. The October 11, 1991 panel opinion affirming the district court's order denying respondent's petition for writ of habeas corpus is reported at 946 F.2d 1356 (8th Cir. 1991), and is published in the Appendix at A-12. The district court's order sustaining and adopting the magistrate's report and recommendation is not reported but is included in the Appendix (A-27). The magistrate's report and recommendation is not published, but is included in the Appendix (A-32).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on April 14, 1992. Pursuant to 28 U.S.C. §2201(c) and Supreme Court Rule 13.1, the present petition for writ of certiorari was required to be filed by petitioner within ninety days. Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

REGULATORY PROVISIONS

28 U.S.C. §2254, Rule 9(b) provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits -or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

Respondent was convicted in the Circuit Court of St. Louis City of capital murder, §565.001, RSMo 1978 (repealed October 1, 1984), and was sentenced to death. The circumstances surrounding respondent's crime were summarized by the Missouri Supreme Court on direct appeal.

> Quintin Moss, a 19-year-old black male, lived with his parents in St. Louis. The record in this case leaves little room for doubt that he was involved in the illicit trafficking of drugs and that he plied his illegal trade near the intersection of Sarah and Olive Streets in St. Louis, six blocks from his parent's place of abode.
>
> Defendant, a black male, was the brother of Dennis Griffin. Reginald Griffin was the nephew of defendant

and Dennis. Prior to the killing of Quintin Moss, the defendant and Reginald lived together with defendant's sister.

In the early hours of January 2, 1980, Quintin Moss and Dennis Griffin arrived at the Moss apartment, awaking Mr. and Mrs. Moss by knocking on the door and ringing the doorbell. Following an argument between Quintin and his father, the latter objecting to his son's bringing "that kind of person home with him", Dennis departed the premises. A short time later he was killed in an alley behind the Moss apartment. About a week later Quintin Moss was arrested for this killing but subsequently released by the authorities. Thereafter, according to Mrs. Moss, she was the recipient of telephone threats

against her son's life because of the killing of Dennis Griffin. She opined the identified telephone caller was a "black male".

May 13, 1980: At about 2 or 2:15 in the afternoon, Quintin Moss and Robert Campbell, a black male, were together near the intersection of Sarah and Olive Streets. About 2:30 p.m. a black over brown older model Cadillac automobile, occupied by two black males, drove up and stopped. One of the occupants stepped out of the vehicle and fired four or five pistol shots in the direction of Quintin Moss and Robert Campbell, one bullet striking and wounding Campbell. The Cadillac, containing the two unidentified black males, then sped away. A short time later, Quintin Moss

was seen beneath his bicycle at the scene of the shooting.

Mrs. Moss was at her home when she saw her son ride up on his bicycle. Quintin was visibly disturbed and upset and explained that he had just been shot at and showed her a dent on his new bicycle. He asked his mother to take him back to the scene of the shooting and she did so.

At about 3:00 p.m., a police officer saw defendant and Reginald Griffin in a black over brown 1968 Cadillac automobile about three miles from the shooting. Reginald was driving the vehicle. When the officer, driving an unmarked police car, pulled up alongside the Cadillac and displayed his badge, the Cadillac accelerated and

drove away. A chase ensued for some distance before the police officer's car and another detective's car forced the Cadillac to a stop. Reginald Griffin was arrested for multiple traffic violations. No weapons were found.

June 26, 1980: Officer Jones, off duty at the time, was driving past 3656 Cook Street at about 4:00 p.m. He saw three black males near the house. He recognized defendant (known to be a police character), a second person wearing a red and white baseball cap, and a third person carrying what appeared to the officer to be a shotgun. Because of heavy traffic, Officer Jones was delayed in circling the block to investigate what he had observed. By the time he

returned, the three men had disappeared.

State's witness, Robert Fitzgerald, a white male, was standing beside his car about 4:30 p.m. near the intersection of Sarah and Olive Streets while two other men were attempting to repair it. Fitzgerald had earlier observed Quintin Moss in the vicinity and concluded Moss was engaged in selling narcotics. Moss was standing on the sidewalk near Fitzgerald's car when Fitzgerald saw a faded blue 1967 or 1968 Chevrolet drive up and stop behind his car. There were two black males in the front seat and a third in the rear seat. There was a burst of gunfire from the Chevrolet and Fitzgerald saw the defendant firing a pistol through the open window of the

passenger side of the front seat of the car. The person in the rear seat was firing a semi-automatic rifle. The direction of the shots was towards Moss and he was struck thirteen times by bullets. A passerby, Wallace Connors, was struck in the buttocks by one of the bullets. Fitzgerald had an unobstructed view of the defendant throughout the shooting and as the Chevrolet drove away. Fitzgerald saw the license plate on the rear of the car and memorized the number. He provided this information to the police and accompanied the officers to the police station where he identified defendant from a group of photographs as being the person firing the pistol from the front seat of the Chevrolet. A short time later

Fitzgerald identified the Chevrolet as the vehicle which had been at the scene of the killing.

The 1968 Chevrolet was parked behind an apartment building and was unoccupied. In the vehicle the officers found a .30 caliber semi-automatic rifle, which contained a clip containing seven live rounds of ammunition, empty rifle shell casings, a .38 caliber revolver, a red and white baseball cap, and a court receipt bearing the name "Reginald Griffin". When fully loaded the clip for the carbine would hold 31 rounds of ammunition. There was expert testimony that a bullet fragment found at the scene of the killing of Quintin Moss had been fired from the carbine, which

> Officer Jones testified was similar in appearance to the firearm one of the black males was carrying at the Cook Street address about 4:00 p.m. Officer Jones also testified the red and white cap was similar to the one he saw being worn by one of the two unidentified black males earlier. A .38 caliber bullet fragment found at the shooting scene was of the same general classification of the revolver found in the Chevrolet. Fitzgerald testified this revolver was similar to the one he saw defendant firing at Moss.

State v. Griffin, 662 S.W.2d 854 (Mo. banc 1983), cert. denied, 469 U.S. 873 (1984) (A-121). After respondent's conviction and sentence, respondent appealed to the Missouri Supreme Court alleging that there was prejudicial

error in the court's instructions to the jury and in admitting certain evidence in the guilt phase of his trial. Respondent also alleged prejudicial error was committed in the admission of evidence at the penalty stage of the trial and that the death penalty violates the federal constitution. The Missouri Supreme Court affirmed both the conviction and sentence. See State v. Griffin, supra.

Respondent also filed a post-conviction relief motion in the circuit court under former Missouri Supreme Court Rule 27.26 (repealed effective January 1, 1988). Upon denial of that motion, respondent appealed the circuit court's judgment to the Missouri Court of Appeals. In that appeal, respondent alleged that he received ineffective assistance of trial counsel because (1) trial counsel failed to interview and

call as a witness Robert Campbell; (2) trial counsel failed to offer mitigating evidence in the penalty phase of his trial; (3) trial counsel failed to file any pretrial motions relating to the death-qualification of the jury; and (4) trial counsel failed to make a timely objection to the testimony of Missouria Moss concerning the contents of phone calls she received. The Missouri Court of Appeals affirmed the circuit court's denial of respondent's post-conviction relief motion in Griffin v. State, 748 S.W.2d 756 (Mo.App. 1988) (A-164).

On June 3, 1988, respondent filed a petition for writ of habeas corpus under 28 U.S.C. §2254 before the United States District Court for the Eastern District of Missouri (A-101). On January 26, 1989, respondent was permitted to substitute appointed counsel of his

choosing and granted leave to amend the petition (A-33). On March 3, 1989, respondent filed an amended petition for writ of habeas corpus (A-88). After litigation before the district court, Magistrate David Noce filed his report and recommendation that the petition be denied (A-32). Chief District Judge Edward L. Filippine adopted the recommendation (A-27).

Respondent raised five points on appeal to the United States Court of Appeals from the district court's denial of his petition for writ of habeas corpus: 1) he was denied due process by the trial court's admission of Missouria Moss' testimony regarding telephone threats; 2) trial counsel was ineffective for failing to object to Missouria Moss' testimony regarding telephone threats; 3) trial counsel was ineffective in failing to contact, in-

terview and obtain Robert Campbell as a witness; 4) respondent was denied his right to confront Campbell when a statement by Campbell was admitted by means of a police officer's testimony; and 5) respondent was denied due process when the prosecutor allegedly used false testimony.

The United States Court of Appeals for the Eighth Circuit affirmed the district court's denial of respondent's petition for writ of habeas corpus on October 11, 1991. See Griffin v. Delo, 946 F.2d 1356 (8th Cir. 1991) (A-12). Respondent filed a petition for rehearing. After appointment of different counsel to represent respondent, the panel granted respondent's petition for rehearing and issued an opinion remanding the cause back to the district court on February 3, 1992. See Griffin

v. Delo, 956 F.2d 167 (8th Cir. 1992) (A-7). Petitioner filed a petition for rehearing or rehearing en banc. The court denied petitioner's motion for rehearing en banc, but Circuit Judges Fagg, Bowman and Hansen dissented (A-87). The panel modified its remand order granting rehearing on April 14, 1992 (A-1). The present petition for writ of certiorari ensues.

ARGUMENT

Whether abuse of the writ under 28 U.S.C. § 2254, Rule 9(b) is excused when a habeas petitioner alleges, in a petition for rehearing to the Court of Appeals, that previous habeas counsel "may not" have presented claims of constitutional dimension that "may have" merit to the district court, without alleging cause as required by McCleskey v. Zant, 499 U.S. (1991).

The present case represents an opportunity for this court to discuss the Court of Appeals' attempts to circumvent the clear language of McCleskey v. Zant, 499 U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 617 (1991), regarding abuse of the writ under 28 U.S.C. §2244 and 28 U.S.C. §2254, Rule 9(b). The proliferation of abusive federal habeas corpus litigation in capital and noncapital settings requires the court

to monitor the federal judiciary to ensure compliance with McCleskey. The Court of Appeals' decision to remand the case under a standard less than McCleskey justifies this court's exercise of discretionary review. Supreme Court Rule 10.1(a), (c). Review of this case also presents the added advantage of giving the lower federal court's guidance in resolving abusive habeas litigation without this court being rushed by stay-of-execution litigation.[1]

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[1]Recognizing that the Supreme Court is considering an abusiveness petition in Sawyer v. Whitley, 112 S.Ct. 434 (1992), petitioner believes it may be appropriate to grant certiorari and remand the case back to the Court of Appeals for further consideration in light of the upcoming opinion in Sawyer.

The Court of Appeals remanded the case back to the district court holding that:

> We do not reach the merits of the appellant's assertions. We find it sufficient to say that counsel may not have recognized and presented issues of constitutional dimension during the post-conviction and habeas proceedings. Counsel may have also failed to adequately bolster claims actually raised. In light of the death sentence under which appellant labors and our granting of permission for his second attorney to withdraw, we believe that a remand with directions to allow the petitioner to raise additional issues for consideration by the district court is the most prudent course. (A-4-5).

The Court of Appeals saw no need to cite precedent; caselaw, statutes, rules, secondary authority, and the like, in support of its decision. The lower appellate court apparently felt

it was writing on a blank slate, but such a feeling is in error.[2]

The Court of Appeals' order remanding the cause back to the district court clearly violates this court's policies discussed in In Re Blodgett, ___ U.S. ___, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992). The Court of Appeals' opinion creates a new rule which undermines the current policies of this court. Just recently, this court held that a habeas petitioner's attempt to avoid the application of McCleskey v. Zant, supra, requiring a petitioner to show cause for his failure to raise his claims in his prior petitions, "manipu-

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[2]This is not the first instance in which the Court of Appeals has remanded a case back to the district court in order to raise additional claims. See Murray v. Delo, No. 91-2542 (8th Cir. order dated November 13, 1991).

late[s] the judicial process." Gomez v. United States District Court, No. A-767 (U.S. April 21, 1992).

The Court of Appeals' opinion did not find that petitioner received ineffective assistance of state post-conviction motion counsel or ineffective assistance of habeas counsel. The Court of Appeals merely held that claims raised for the first time in his motion for rehearing "may have merit" (A-3). In fact, the Court of Appeals held "[w]e do not reach the merits of appellant's assertions [of ineffectiveness of habeas counsel]" (A-4). The court merely held that "[w]e find it sufficient to say that counsel may not have recognized and presented issues of constitutional dimension during the post-conviction and in habeas proceedings" and that "[c]ounsel may have also failed to adequately bolster claims

actually raised" (A-4-5) (emphasis added). This finding does not establish a sufficient basis for remanding the cause back to the district court. Rather, this action clearly violates this court's previous decisions in McCleskey and In Re Blodgett.

The Court of Appeals' language that counsel may not have recognized and presented issues of constitutional dimensions during post-conviction proceedings conflicts with this court's decision in Coleman v. Thompson, 499 U.S. ___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), which held that ineffective assistance of post-conviction counsel cannot constitute cause for procedural default or abuse of the writ. Although the Court of Appeals' opinion does not conclude that ineffectiveness constitutes cause, the remand because counsel "may not" have raised claims and "may

not" have bolstered claims warrants scrutiny since this is a standard that is less strict than ineffectiveness.

Pursuant to the Court of Appeals' opinion, a habeas petitioner need only allege that he or his counsel may have failed to recognize and present issues in order to be entitled to a remand to the district court. As the Court of Appeals seems to hold, a habeas petitioner/appellant may be entitled to remand if all conceivable claims were not litigated before the district court. Under the Court of Appeals' language, a habeas petitioner/appellant is entitled to remand if he can think up just one more claim during the appellate process. If after remand and appeal, appellant thinks up another claim, then remand again would be necessary.

As this court held in McCleskey v. Zant, supra, "[a]ttorney error short of ineffective assistance of counsel, however, does not constitute cause." Id. at 1470. Likewise, attorney ignorance or inadvertence is not "cause" because the attorney is petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must "bear the risk of attorney error." Coleman v. Thompson, supra at 2566-2567, quoting Murray v. Carrier, 477 U.S. 478, 488 (1986).

McCleskey holds that "the question is whether petitioner possessed, or by reasonable means, could have obtained the sufficient basis to allege a claim in his first petition and pursue the matter through the habeas process." Id. at 1472. This requires that petitioner include all relevant claims in his first petition. Id. Omission of a

claim "will not be excused" merely because evidence discovered later might have supported or strengthened the claim. Id. Although this is petitioner's first petition for writ of habeas corpus, the Court of Appeals have typically held that attempts to amend petitions after judgments is inequitable and an abuse of the writ. See Simmons v. Lockhart, 856 F.2d 1144, 1146 (8th Cir. 1988) (treating new claims in "Motion to Recall Mandate" as abusive), on appeal from remand, 915 F.2d 372 (8th Cir. 1990); Smith v. Armontrout, 888 F.2d 530, 540 (8th Cir. 1989) (treating new claims in "Motion to Remand" as abusive), stay denied, 493 U.S. 1039 (1990).

The Court of Appeals' opinion remanding the case to the district court because counsel "may not" have raised claims or "may not" have bolstered

claims actually raised severely depreciates this Court's decision in McCleskey, Coleman, and Murray. The Court of Appeals' opinion that habeas counsel may not have recognized and presented issues of "constitutional dimension" conflicts with this Court's holding in McCleskey v. Zant, supra, that a petitioner has no right to effective assistance of habeas counsel. Id. at 1471. However, since there is no express finding of ineffective assistance of habeas counsel, it appears that the appellate court found at most attorney error or inadvertence, a finding insufficient to support the legal conclusion of cause under Murray.

Moreover, under the Court of Appeals' standard, all cases would require reversal and remand when "counsel may have also failed to adequately bolster claims actually raised." (A-4-5).

By definition, all claims presented to the Court of Appeals by a habeas petitioner/appellant will not have been adequately bolstered since they were denied by the federal district court. The role of finality in the criminal law was discussed by this court in McCleskey v. Zant, supra at 1468-70. This court's opinion in McCleskey does not encompass multiple or even one remand just because an appellant asserts the existence of an unlitigated claim.

The order remanding the cause back to the district court by the Court of Appeals raises "the very concern regarding delay that were part of the rationale for this court's decision in Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) and McCleskey v. Zant, 499 U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). Adherences to those decisions, and their prompt en-

forcement by the district courts and Court of Appeals will obviate in many cases what the Court of Appeals here seems to perceive to be the necessity for acknowledging multiple filings." In Re Blodgett, supra at 676.

The Court of Appeals' holding that "[i]n light of the death sentence under which appellant labors and our granting of permission for a second attorney to withdraw, we believe that remand with the direction to allow the petitioner to raise additional issues for consideration by the district court is the most prudent course", seems to distinguish this case simply because it is a capital case (A-5) (emphasis added). Such is contrary to this court's holding in Smith v. Murray, 477 U.S. 527, 538 (1986) ("we reject the suggestions that the principles of Wainwright v. Sykes applied differently depending on the

nature of the penalty a state imposes for the violation of its criminal laws.") The Court of Appeals' holding that remand is "prudent", does not explain the prudence in allowing the filing of a second, third, fourth, fifth or hundredth petition for writ of habeas corpus (A-5).

Petitioner submits that the Court of Appeals' remanding of the cause back to the district court in order that respondent may raise additional claims that were not raised in his original petition for writ of habeas corpus constitutes an abuse of the writ. Accordingly, petitioner respectfully requests this court to grant certiorari in order to examine the continuing attempts by the lower courts to circumvent this court's holdings regarding abuse of the writ.

CONCLUSION

Petitioner respectfully requests this court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and reverse the judgment of that Court.

Respectfully submitted,

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